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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1296

AMERICAN SMELTING AND REFINING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 14, 1969.

OPINION BELOW

The opinion of the Court of Appeals is reported at 406 F.2d 552, and is found in Appendix A, *infra,* p. 1a. The judgment of the court is found in Appendix B, *infra,* p. 6a. The decision and order of the National Labor Relations Board and the Trial Examiner's decision are reported at 167 N.L.R.B. No. 26, and are found in Appendix C, *infra,* p. 10a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 19 of the Revised Rules of this Court.

QUESTIONS PRESENTED

1. Does an employer have a mandatory duty to bargain with a collective bargaining representative of its employees concerning the rentals charged for employer-owned housing facilities rented to some employees and others in the absence of substantial evidence in the record that the rentals charged constitute an element of wages or that the subject materially and substantially affects the terms and conditions of employment and is amenable to the collective bargaining process?

2. Is the National Labor Relations Board entitled to rely on unsupported presumptions and inferences in concluding that, under a given set of facts, a proposed subject of collective bargaining constitutes "wages, hours, and other terms and conditions of employment"?

STATUTES INVOLVED

The statutory provisions involved herein are portions of 29 U.S.C. § 158(a)(1) and (5), § 158(d) and § 159(a), reading:

> 158. UNFAIR LABOR PRACTICES
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . .

159. REPRESENTATIVES AND ELECTIONS—EXCLUSIVE REPRESENTATIVES; EMPLOYEES' ADJUSTMENT OF GRIEVANCES DIRECTLY WITH EMPLOYER

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . .

. . . .

July 5, 1935, c. 372, § 9, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1(c, d), 65 Stat. 601; Sept. 14, 1959, Pub. L 86-257, Title II, § 201(d), Title VII, § 702, 73 Stat. 525, 542.

STATEMENT OF THE CASE

This case involves the meaning and the scope of the phrase "other terms and conditions of employment" in Section 8(d) of the National Labor Relations Act, and the legality of a decision of the National Labor Relations Board based substantially upon unsupported presumptions and guesses adverse to the employer.

Petitioner is a mining company which, as part of its Arizona operations, maintains a copper mine, crusher and concentrator at Silver Bell, Arizona, approximately forty miles northwest of Tucson, Arizona. The International Union of District 50, United Mine Workers of America (Ind.) (hereinafter called "the Union") has represented Petitioner's production and maintenance employees at that location for a number of years. Located near the mine is a townsite in which the Petitioner owns 199 dwelling units and 50 trailer spaces. The dwelling units consist of two- and three-bedroom houses, and two- and three-bedroom apartments. As of October 12, 1966, Petitioner employed 317 persons at the Silver Bell location. Two hundred eight employees lived in company-owned housing and 109 lived elsewhere. It is not a requirement that the employees live at the townsite. Petitioner maintains the townsite and pays all utilities. It also pays for garbage and trash collection. From the time when the company housing was first occupied in 1952, until September 1966, the rent did not change. The amount which was to be charged for monthly rent was unilaterally determined by the Petitioner, and the Union at no time ever overtly claimed that it had a right to be consulted as to the amount to be charged as rent. At no time during this period did the Union attempt to become involved with the operation of the housing

in any manner. The complete operation of the company housing was left solely to the discretion of the Petitioner, who made all decisions unilaterally as to its maintenance and operation. In September 1966, the Petitioner unilaterally increased the rent on two- bedroom houses by $5.00 per month, and on the three-bedroom houses by $10.00 per month. Rent on the apartments and trailer spaces remained unchanged. When Petitioner raised the rent, the Union protested, maintaining that the rent charged for company housing was a mandatory subject of collective bargaining, within the meaning of Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5), 159(a), and Title 29, U.S.C. Petitioner maintained that it was not. The Union filed a charge with the National Labor Relations Board, and a complaint issued.

A hearing before a trial examiner was held on January 17, 1967, in Tucson, Arizona. The parties entered into stipulations as to a number of factual matters at the commencement of the hearing. The stipulated facts pertinent to this petition are as follows:

(1) Each occupant of a house, apartment or trailer space enters into a formal lease with Petitioner. (R.T. 9)

(2) The first labor agreement between Petitioner and the Union at Silver Bell, Arizona, was concluded on December 15, 1954, and was for a two-year duration. (R.T. 11)

(3) Additional labor agreements were negotiated in 1956, 1959, 1961, 1962 and 1964. The expiration date set forth in the then current labor agreement was September 30, 1967. (R.T. 11)

(4) No employee of the Petitioner is required to live at Silver Bell, Arizona, as a condition of his employment. (R.T. 12)

(5) Employees who do not live at Silver Bell, Arizona, whether salaried or bargaining unit employees, are paid at the same rate of pay as employees who live at Silver Bell, Arizona, for their respective occupational classifications. There is no travel allowance paid to employees who do not live at Silver Bell. (R.T. 13)

(6) Petitioner's townsite at Silver Bell, Arizona, is approximately forty miles from Tucson. The maintenance of the residences and townsite is performed by Petitioner's maintenance employees. The rents are paid by payroll deduction and all present occupants have authorized, in writing, payroll deduction for rent. (R.T. 16)

(7) Petitioner owns and operates a mine, crusher and concentrator known as the Mission Unit, approximately twenty miles southwest of Tucson. There are no housing units at the Mission Unit. Wages for comparable occupational classifications at Petitioner's Mission Unit are the same as, or slightly lower than, those at Petitioner's Silver Bell operation. No travel allowance is paid to employees of Petitioner at the Mission Unit. (R.T. 19)

At the hearing before the trial examiner, counsel for the General Counsel, apparently attempting to prove that the rentals charged by Petitioner were so low as to constitute an element of wages, sought to introduce evidence concerning the rentals for comparable housing in nearby communities. At first, this proffered evidence was in the form of what purported to be a portion of the classified section of *The Arizona Daily Star* published in Tucson. After this evidence

was rejected by the trial examiner, who characterized it as "the most flagrant of hearsay" (R.T. 32), counsel for the General Counsel attempted to establish a comparison of rentals between housing in Tucson and Silver Bell through the testimony of a Mr. Albert Avenetti, a staff representative of the Union who had formerly been employed by Petitioner at Silver Bell. Petitioner objected to such testimony on the grounds that Mr. Avenetti was not an expert, and the trial examiner sustained the objection (R.T. 39). These and other rulings of the trial examiner were later affirmed by the Board. The counsel for the General Counsel made no further attempt to introduce evidence to establish that the rentals charged for housing at Silver Bell were lower than the rentals charged for comparable housing in Tucson, and the other nearby communities, even though he had ample opportunity to do so (R.T. 39).

The General Counsel also introduced evidence in the form of testimony from Mr. Avenetti that the subject of company housing had been discussed in negotiations leading up to the most recent collective bargaining agreement as well as the prior negotiations (R.T. 42-45). Mr. Avenetti's testimony was impeached (R.T. 52-58), and the trial examiner declined to credit it.[1]

Although the trial examiner appeared to recognize the limitations on the scope of an employer's duty to bargain implicit in the statutory phrase "other terms and conditions of employment" discussed in this Court's decision in *Fibreboard Corporation* v. *NLRB,* 379 U.S. 203 (1964), he concluded that previous decisions of the Board compelled a finding that company-owned housing is per se a mandatory subject of col-

[1] Trial Examiner's Decision, p. 4, ll. 56-59.

lective bargaining.[2] The Board adopted the trial examiner's findings and conclusions, with exceptions not relevant here. In a footnote to its decision and order, the Board stated that the fact that no increase in rent was made during the 12-year period "indicates" that the rents were below the prevailing rate and that the convenience of living near the place of work gave the occupants of the housing advantages which "undoubtedly" affect their conditions of employment.[3] In another footnote, the Board stated that Petitioner had relied on the availability of company housing as a basis for rejecting the Union's bargaining demands in contract negotiations,[4] notwithstanding the fact that the only testimony to this effect had not been credited by the trial examiner.

Petitioner filed a petition with the United States Court of Appeals for the Ninth Circuit seeking to have the Board's order set aside. In its brief and argument to that court, Petitioner relied in part on the General Counsel's failure to prove by a preponderance of the evidence that the rentals charged were an element of wages or that they materially and substantially affected the employment relationship, citing *NLRB* v. *Bemis Bro. Bag Co.*, 206 F.2d 33 (5th Cir. 1953), a case similar to the case at hand. Petitioner also discussed the implications of this Court's decision in *Fibreboard* and the opinion of the Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corporation* v. *NLRB,* 387 F.2d 542 (4th Cir. 1967). The Board

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[2] Neither the trial examiner nor the Board mentioned the Board decision to the contrary in Kohler Co., 128 N.L.R.B. 1062 (1960).

[3] Decision and Order, p. 1, n. 1.

[4] Decision and Order, p. 2, n. 1.

filed a cross-petition for the enforcement of its order relying in part on *NLRB* v. *Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953).

Although rejecting the Board's argument that the subject of company-owned housing is per se a mandatory subject of collective bargaining, the Court of Appeals enforced the Board's order. In its opinion, the court relied in part on the discredited testimony of Mr. Avenetti, adopted the unsupported assumptions appearing in the footnotes to the Board's decision and made one assumption never mentioned by Petitioner, the General Counsel, the trial examiner or the Board.

REASONS FOR GRANTING THE WRIT

1. Conflict of decisions.

Three different Courts of Appeal have been squarely presented with the issue of whether the amount charged for rental of employer-owned housing is a mandatory subject of collective bargaining.[5] In all three cases,

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[5] Other cases have discussed the issue. In NLRB v. Hart Cotton Mills, 190 F.2d 964 (4th Cir. 1951), the court said by way of dictum that in many circumstances company-owned housing is "a necessary part of the enterprise." In Kohler Co., 128 N.L.R.B. 1062 (1960), *enforced*, Local 833, UAW v. NLRB, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), the Board itself concluded that occupancy of space in a company-owned hotel and in other company housing was *not* a condition of employment because (1) residence was not restricted to employees; (2) rents had not been shown to be below prevailing rates and (3) there was no showing that other nearby facilities were not available. See Board's brief to the Court of Appeals, p. 15, n. 16. Other Board decisions concerning the issue are Florida Citrus Canners Cooperative, 124 N.L.R.B. 1182 (1959); Elgin Standard Brick Mfg. Co., 90 N.L.R.B. 1467 (1950); and Abbott Worsted Mills, 36 N.L.R.B. 545 (1941), *enforced*, NLRB v. Abbott Worsted Mills, 127 F.2d 438 (1st Cir. 1942).

the Board concluded that the subject of the rentals for company-owned housing is a mandatory subject of collective bargaining.[6] In *NLRB* v. *Lehigh Portland Cement Co., supra,* and in the instant case, the Fourth and Ninth Circuits, respectively, enforced the Board's orders, holding that they were supported by substantial evidence. In *NLRB* v. *Bemis Bro. Bag Co., supra,* the Fifth Circuit declined to enforce the Board's order, holding that the subject was not a mandatory subject of collective bargaining and that the Board's decision and order to the contrary were not supported by substantial evidence. *Bemis Bro. Bag Co.* and *Lehigh Portland Cement* were decided some 15 days apart. Neither the employer in *Lehigh Portland Cement* nor the Board in *Bemis Bro. Bag Co.* sought review by petitioning this Court for a writ of certiorari.

In view of the fact that in all three cases the courts' decisions were based upon the particular facts, it might be argued that the cases can be distinguished and that there is therefore no conflict between the Circuits. However, an analysis of the cases demonstrates that any factual distinctions that can be made do not relate to the impact of company housing in a particular instance on the employment relationship.

A brief examination of the facts of the three cases makes it clear that they are hopelessly in conflict and provide no meaningful guidelines. In *Bemis Bro. Bag Co.,* where some 35% to 45% of the employees occupied company-owned housing, only three nonem-

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[6] A position it retreated from once, in Kohler Co., 128 N.L.R.B. 1062 (1960), *enforced,* Local 833, UAW v. NLRB, 300 F.2d 699 (D.C. Cir.), *cert. denied,* 370 U.S. 911 (1962).

ployees occupied such housing, and there was a waiting list of some 80 applicants, the subject was held not to be a mandatory subject of collective bargaining. In *Lehigh Portland Cement,* on the other hand, only 25% of the employees lived in company-owned housing, five of 65 housing units were occupied by "outsiders", and there was no mention of whether there was a waiting list for housing. Nevertheless, the court held that the company had a duty to bargain with the union about rentals. In the instant case, there was a waiting list of indeterminate numbers for the housing, some five or six housing units were occupied by nonemployees, and a larger percentage of employees (some 65%) lived in company-owned housing.

In its brief and argument to the Court of Appeals, Petitioner urged that the material facts in this case were similar to those in *Bemis Bro. Bag Co.* In its opinion, the court attempted to distinguish *Bemis* from the instant case in the following respects:

1. In *Bemis* the company plant and housing were on the edge of a town of 13,000, while in the instant case communities where there is other available housing are 25 and 40 miles away. (Petitioner submits that in a day and age when people think nothing of commuting an hour or an hour and a half to and from work, that fact is not relevant.)

2. The court pointed out that in *Bemis* only about a third of the employees lived in company houses, while in the instant case two-thirds did. (In no previous case on the subject has the percentage of employees living in company housing been mentioned as a relevant factor. If it is, the decisions in *Bemis* and *Lehigh Portland Cement* cannot possibly be squared.)

3. The court said that in the instant case "there is a waiting list for the housing." (It overlooked the fact that in *Bemis* there was a waiting list of some 80 people for the housing.)

4. It said that in *Bemis* public transportation was available, but that in the instant case "public transportation is apparently not readily available." (On this point, the court fell into the Board's error of relying on guesswork, there being no evidence in the record concerning the matter, the General Counsel having not seen fit to introduce any.)

In addition, the court relied upon the discredited testimony of Mr. Avenetti to the effect that the company relied upon the "availability" of company housing in rejecting the Union's bargaining demands for travel allowance pay. The fact that there are insufficient housing units at Silver Bell to house all of the employees in the bargaining unit would make it impossible for the company to reject a bargaining demand for travel allowance pay on the basis of the "availability" of company housing. In addition, the record shows that the Union never made a written contract demand with respect to the travel allowance pay, rentals charged for the housing or, for that matter, for any other aspect of the housing. (R.T. 84).

In the sense that there are some differences between the facts in the three cases, they can ostensibly be "distinguished". Such distinctions must be meaningful and must, in this situation, be relevant to the question of whether the subject of company housing can fairly be deemed to be included in the statutory phrase "wages, hours of employment, or other conditions of employment" based upon the facts in *Lehigh* and the

instant case, and excluded from the ambit of that phrase based upon the facts in *Bemis Bro.* Petitioner submits that the differences in the results of the three cases cannot be defended on the basis of distinctions between relevant facts bearing upon the impact of employer-owned housing on the employment relationship. The conflict makes it impossible for the many employers and unions involved to determine whether the rentals charged for company-owned housing is a mandatory subject of collective bargaining in a particular instance.

Until now, the opportunity has not presented itself for this Court to resolve the long-standing conflict between the decisions in *Bemis* and *Lehigh.* It should give this case plenary consideration to resolve the uncertainty which results from the conflict.

2. The decision of the Court of Appeals enforcing the Board's order departs from the guidelines for determining what subjects are mandatory subjects of collective bargaining set forth in this Court's decision in Fibreboard Corporation v. NLRB, 379 U.S. 203 (1964).

One of the most troublesome areas in the administration of the National Labor Relations Act is the meaning of the statutory phrase "wages, hours, and other terms and conditions of employment" appearing in Section 8(d) of the Act which determines those subjects which are mandatory subjects of bargaining for parties in a collective-bargaining relationship. The last time this Court gave plenary consideration to a case involving the meaning and application of this phrase was in *Fibreboard Corporation* v. *NLRB.* Although the Board has long taken the position that the phrase should be very broadly interpreted, that position has not been upheld by courts generally and

was not upheld by this Court in *Fibreboard*. In that case, this Court appropriately observed that replacement of bargaining unit employees with other employees not only affected conditions of employment, it affected the employment relationship itself. The Court was very careful to point out that it was not expanding upon the mandatory subjects of collective bargaining. It mentioned certain guidelines which, while not determinative, are often helpful in determining whether a subject is a mandatory subject of collective bargaining. One of these was whether industrial experience indicated that the particular subject lent itself to the processes of collective bargaining. The fact that clauses relating to contracting out often appear in collective bargaining contracts and subcontracting is "grist in the mills of arbitrators"[7] lent weight to the Court's conclusion that, in the context of those facts, subcontracting was an issue which could appropriately be resolved within the collective bargaining framework. That is not the case here, as there is no evidence whatsoever that employer-owned housing "has been brought widely and successfully within the collective bargaining framework."[8] The paucity of decided cases and published arbitration awards on the subject suggests that it has been neither widely nor successfully brought within the collective bargaining framework. Cases involving subcontracting or contracting out abound in published awards of arbitrators.[9] Petitioner is una-

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[7] Fibreboard Corp. v. NLRB, 379 U.S. 203, 212 (1964), citing United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

[8] *Id.* at 211.

[9] See pp. 787-817, Labor Arbitration Cumulative Digest & Index with Table of Cases, covering Vol. 31-40 Labor Arbitration Reports (The Bureau of National Affairs, Inc. 1964).

ware of a single published arbitration award concerning the issue of company-owned housing, suggesting, at the very least, that unions and employers at plants where there is company-owned housing do not consider that the subject lends itself to the processes of collective bargaining in the same way that the subjects of pensions, work rules, discharge and discipline and the like do. It is not difficult to understand why persons experienced in collective bargaining would conclude that subjects such as the adequacy of garbage service, quality of home repairs, frequency of repainting, and the whole myriad of subjects concerning a landlord-tenant relationship do not lend themselves to its processes.

Subsequent to the decision of this Court in *Fibreboard,* the Fourth Circuit considered a case not unlike the instant case in principle. In *Westinghouse Electric Corporation* v. *NLRB,* 387 F.2d 542 (4th Cir. 1967), Judge Boreman, speaking for the court, en banc, had the following comments about the correct determination of whether an issue falls within the statutory definition "other terms and conditions of employment":

> In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncements of this court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment.
>
> The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider

> "vital." Nor is there any evidence that the inclusion of this issue here within the collective bargaining framework is a wide-spread industrial practice. 387 F.2d at 548.

Petitioner submits that the foregoing statement is an accurate reflection of the scope of the duty to bargain as set forth in the decision of this court in *Fibreboard*. The comment that "the case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider 'vital'" could be made with as much validity in the instant case. No one's job, compensation, retirement rights, or working conditions are involved here. There is a point at which a subject, even though it may be of interest to some employees, does not have a significant or material relationship to wages, hours, or other conditions of employment. We may have reached that point here. The Court should hear the matter in order to determine whether the guidelines set forth in its decision in *Fibreboard* have been transgressed and whether they should be amplified.

3. This Court should determine the extent to which the National Labor Relations Board, or any other administrative agency, is entitled to base its decisions upon unsupported presumptions and guesses, an important question of federal law which has not been settled by this Court.

In the instant case, counsel for the General Counsel valiantly and laboriously attempted to introduce evidence to the effect that the amount of rentals was so low as to constitute an element of wages, thus bringing the subject within the statutory definition. He completely failed. The Board remedied this vacuum in the evidence by supplying a guess or presumption or, in its own word, an "indication" that the rents were below the prevailing rate by reason of the fact that

there had been no increase during a 12-year period. The Board is not reluctant to draw inferences unfavorable to employers. See *Westinghouse Electric Corporation* v. *NLRB, supra.*[10] Obviously, the Board is entitled to draw inferences in certain circumstances.[11] Such inferences must be based upon facts. Without something more in the record, the Board could not justifiably conclude that the fact there was no increase in the rents for twelve years meant that the rents were so low as to, in effect, be part of the tenant-employee's compensation. There are inferences just as plausible. Rental rates for comparable housing in Tucson and other nearby areas might well have remained substantially the same during the period, either because of a surplus of housing or for other reasons. If rental rates for housing in Tucson and other areas have increased, the Silver Bell rentals may have been higher in 1954 than those charged for comparable housing in the area, thus resulting in the rentals at all locations being approximately equal in 1966.

In a companion proceeding recently before the Board,[12] a trial examiner suggested that the Board was taking official notice of facts pursuant to the Administrative Procedure Act.[13] Petitioner submits that such an argument is patently absurd. Implicit in the doctrine of official notice is notice, and an opportunity to

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[10] The Board often draws such inferences in cases involving discharges for allegedly engaging in activity protected by the Act. See, for example, NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968).

[11] See, for example, NLRB v. Fairmont Cremery Co., 169 F.2d 169 (10th Cir. 1948).

[12] American Smelting & Refining Co., 174 N.L.R.B. No. 117 (1968).

[13] 5 U.S.C. § 556(e).

be heard. An administrative body which purports to take official notice of a fact without giving an interested party an opportunity to be heard denies that party due process of law.[14] The General Counsel made such attempts to introduce evidence concerning rentals of comparable housing, Petitioner had no reason to believe that the issue would be resolved by the Board making an offhand reference to an "indication" in a footnote to its decision. In any event, the doctrine of official notice applies only to facts which are notorious and are common knowledge.[15] That the rentals charged for housing by this employer are lower than rentals for comparable housing in nearby communities is most assuredly not a matter of common knowledge to this Petitioner, much less to the Board.

Again, in an off-hand way, the Board determined a crucial issue by inserting a guess into the evidentiary vacuum when it stated in a footnote that the convenience of living near the place of work gave the occupants of the housing advantages which "undoubtedly" affect their conditions of employment. The Board apparently concluded that there was no reason to believe that any of Petitioner's employees could find it more advantageous to live in Tucson, a modern city of 300,000 inhabitants with its social, educational and recreational advantages. Surely it is not always considered to be an advantage outweighing other considerations for a person to live near his place of work.[16] Millions of Americans, undoubtedly including a substantial number of the members of the Bar of this Court, spend more time traveling to and from work than employees of Petitioner who live in Tucson.

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[14] Cook v. Celebrezze, 217 F. Supp. 366 (W.D. Mo. 1963).

[15] *Id.*

[16] The trial examiner himself recognized this. (R.T. 40)

It is one thing to supply an unsupported presumption or inference or take official or judicial notice of a matter of secondary importance. That is not the situation here. Here the Board supplies its inferences to support its basic findings on the very point in issue. As Mr. Justice Brandeis observed in *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U.S. 292, 301 (1937):

> Courts take judicial notice of matters of common knowledge. (Citations omitted) They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. (Citations omitted) How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states (citations omitted), but not of the extent of the depreciation at a given time and place. (Citations omitted) *The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue.* (Emphasis supplied.)

In this case, the Board might have been justified in taking official notice of a general rise in prices during the period involved but not of an increase in the cost of a particular item in a particular locality, one of the very points in issue.[17]

In *Westinghouse Electric Corporation* v. *NLRB, supra,* the Board indulged in similar "presumptions"

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[17] The limitations on the doctrine of judicial notice set forth in Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937), are equally applicable to the use of official notice in administrative proceedings. U.S. *ex rel.* Dong Wing Ott v. Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. 1953).

and "inferences" to remedy deficiencies in proof. The court had the following comments concerning these "inferences" and "presumptions":

> The Board majority then says:
>
> > "The fact is that a considerable number of employees do not wish to bring their lunches from home, and if they had to do so would *presumably* look for employment elsewhere. Such employees are in substance and effect captive customers of the on-site cafeterias, * * *." (Emphasis supplied.)
>
> As indicated, the conclusion that the employees who do buy lunches at the cafeterias would quit good jobs at high pay if they had to bring their own lunches is only a *presumption,* one unsupported by any evidence. Certainly no one suggested that an employee had to buy meals at the cafeterias or resign his job. Precisely the contrary is true. Most of the employees do not buy their lunches there and, of course, they have not quit their jobs. Stripped of unsupported presumptions and guesses, the statement of the Board majority is that anyone who prefers buying his meals in a cafeteria to bringing his lunch from home is, for that reason, a captive customer of the cafeteria. The only compulsion is the individual's own desire or preference, which is precisely the same as saying that there is no compulsion. 387 F.2d at 549.

In *Westinghouse* and in the instant case, to name only two, the Board has relieved the General Counsel of his burden of proving the commission of an unfair labor practice by relevant and material evidence. In *Westinghouse,* the Court of Appeals recognized that the Board's position was untenable, resting as it did

on unsupported presumptions and guesswork. This Petitioner was not so fortunate, and it respectfully submits that this Court should hear this matter on the merits to determine the extent to which the Board is entitled to base ultimate findings concerning the extent of the duty to bargain on such unsupported presumptions.

CONCLUSION

The questions presented by the instant case do not relate solely to employer-owned housing, important as that issue is. They relate to the entire administration of the National Labor Relations Act and are important and unsettled. They deserve to be settled in the interests of a reasonable administration of the Act, based on the realities of the collective bargaining process.

It is respectfully submitted that a writ of certiorari should issue to review the decision of the court below.

Respectfully submitted,

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